

May 28, 2009

The Honorable Colin R. M. J. Bonini
Senate
State of Delaware
Legislative Hall
Dover, DE 19903

Re: Nonresident Voting in Municipal Elections

Dear Senator Bonini:

You have asked for an Attorney General's opinion on the constitutionality of municipal charters that allow nonresidents to vote in local elections and to hold local office. The General Assembly has provided that voter and candidate eligibility for municipal elections, other than the City of Wilmington, shall be determined by the town charter. 15 *Del. C.* §§ 7554, 7555. A number of Delaware towns, particularly beach towns, have extended to nonresidents the right to vote in local elections and the right to hold local office. We have examined the charters of several of those towns, and have considered the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution, as well as Article V of the Delaware Constitution.

The weight of authority is that extending the vote to nonresidents does not violate the U.S. Constitution. The state Constitution does not clearly prohibit nonresident voting in municipal elections or nonresidents holding local office, and Delaware statutes enjoy a presumption of constitutionality. In the absence of a clear prohibition, we cannot conclude that nonresident voting and office holding, as provided in town charters, are unconstitutional under either the U.S. or the Delaware constitutions.

1. There is no clear constitutional language restricting nonresidents from holding local office.

“The right of a person to be a candidate for public office is a fundamental one that should be restricted only by clear constitutional or statutory language.” *Democratic Party of the State of Delaware v. Dep't of Elections for New Castle County*, 1994 WL

55405, at *6 (Del.Super. 1994), *aff'd*, 650 A.2d 1305 (Del. 1995) (table). The Delaware Constitution does not address qualifications for municipal office, and the U.S. Constitution has not been applied to that issue. Thus, there is no authority for concluding that nonresidents cannot hold local office.

2. Nonresident voting does not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution prohibits a State from denying any person equal protection of the laws. The argument has been made that nonresident voting is unconstitutional under the Equal Protection Clause because it “dilutes” the votes of residents. This argument has not been successful. *May v. Town of Mountain Village*, 132 F.3d 576 (10th Cir. 1997); *Duncan v. Coffee County, Tenn.*, 69 F.3d 88 (6th Cir. 1995); *Sutton v. Escambia County Bd. of Educ.*, 809 F.2d 770 (11th Cir. 1987); *Levy v. Miami-Dade County*, 254 F.Supp.2d 1269 (S.D.Fla. 2003); *Spahos v. Mayor and Councilmen of the Town of Savannah Beach, Tybee Island, Ga.*, 207 F.Supp. 688 (S.D.Ga. 1962) *aff'd per curiam*, 371 U.S. 206 (1962). Each of these federal courts has applied a “rational basis” test to the challenged statutes, and found that because “[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality . . . [a state statute] will not be set aside if any state of facts reasonably may be conceived to justify it.” *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1960).

[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective.

Id.

The cases that have considered nonresident voting under the Fourteenth Amendment have concluded that the State’s interest in extending the vote to nonresidents is rational, because nonresidents may have a legitimate interest in the governance of a town in which, for example, they own property. Based on the overwhelming precedent from other jurisdictions, we assume the courts would apply the rational basis test to the Delaware town charters, and the charters would be upheld.

3. The Delaware Constitution does not clearly require that voters in municipal elections be residents of that municipality.

Article V of the Delaware Constitution establishes the rules for elections. Article V, § 1 states when and how the “General Election” shall be held. Section 2 sets forth the residency qualifications for voters in “an election”: voters “shall have been a resident [of the State] one year . . . and for the last three months a resident of the county, and for the last thirty days a resident of the hundred or the election district in which he or she may offer to vote, and in which he or she shall be registered, for all officers . . . that may be elected by the people and upon all questions which may be submitted to the vote of the people. . . .” The question is whether section 2 applies only to statewide elections or covers municipal elections, as well.

That question cannot be answered by a textual analysis. The text of section 2 simply refers to “an election,” without defining that term. The framers of the Constitution did not debate which elections section 2 is intended to cover; but one remark suggests section 2 applies only to the general election.¹ 4 *Debates and Proceedings of the Constitutional Convention of the State of Delaware* 3033 (1958) (Charles F. Richards) (“In section 2 we attempt to provide as to who shall have the right to vote at any election provided in the first section of this article.”). Further support for excluding municipal elections from the scope of section 2 is that sections 3 (influencing a voter) and 7 (election offenses) do explicitly cover municipal elections, which suggests that section 2, by not mentioning municipal elections, means not to apply to them.

The Delaware courts have not considered the meaning of “an election” in Art. V, § 2. In *McComb v. Robelen*, 116 A. 745, (Del. Ch. 1922), in which the issue was whether the reference in § 2 to voters registration meant that only registered voters were qualified to vote, Chancellor Josiah Wolcott would not consider “[w]hether the elections referred to [in Art. V, § 2] are to be in any wise restricted to elections specifically contemplated by the Constitution” *Id.* at 747. Without guidance from the text or judicial opinions, we cannot speculate that a statute is unconstitutional.

“Enactments of the Delaware General Assembly are presumed to be constitutional.” *Hoover v. State*, 958 A.2d 816, 821 (Del. 2008). “Further, all reasonable doubts as to the validity of a law must be resolved in favor of the constitutionality of the legislation.” *Id.* (internal quotations omitted). Because there is a “reasonable doubt” as to whether the Delaware Constitution requires that all voters be residents, we must conclude that 15 *Del. C.* § 7554, which permits the towns to set their own voting

¹ The term “general election” does not include municipal elections. *Abrahams v. Superior Court*, 131 A.2d 662 (Del. 1957).

The Honorable Colin R. M. J. Bonini
May 28, 2009
Page 4

requirements, and the town charters, which are enacted by the General Assembly, are constitutional.

Very truly yours,

Lawrence W. Lewis
State Solicitor